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Supreme Court, U.S.
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No. 08-137

In The Supreme Court of the United States

DR. SAMI AMIN AL-ARIAN

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether parol evidence may be used in supplementing or understanding a plea agreement, where there is uncontested evidence of an oral agreement that is not reflected in the written plea agreement.

Whether a Defendant is entitled to an evidentiary hearing to establish an oral agreement on a material condition was part of a plea agreement.

PARTIES TO THE PROCEEDING

Petitioner Dr. Sami Amin Al-Arian is currently in the custody of Immigration and Customs Enforcement (ICE). Respondent is the United States Government.

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On Petition For A Writ of Certiorari To The United States Court Of Appeals For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Dr. Sami Amin Al-Arian respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. 1) is reported at 514 F.3d 1184 (11th Cir. 2008). The district court's memorandum and order (App. 18), issued on November 9, 2006 is not reported.

JURISDICTION

The court of appeals entered its judgment on January 25, 2008. Dr. Al-Arian filed a timely petition for rehearing en banc on February 14, 2008, which was denied on April 1, 2008. (App. 22). On June 25, 2008, Justice Thomas extended the time to file a petition for writ of certiorari to and including July 30, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states that "[n]o person shall be . . . be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

In September 2004, Dr. Sami Amin Al-Arian was charged, along with various co-defendants, in a 53-count Superseding Indictment. Following a highly publicized six-month trial in 2005, Dr. Al-Arian was

acquitted on eight counts and the jury was unable to reach a unanimous verdict on the remaining nine counts.[1] There were only two jurors who voted against acquitting Dr. Al-Arian of all of the remaining counts

As the government considered whether to bring charges against Dr. Al-Arian on the remaining counts, the parties began to negotiate a plea agreement. As a result of these negotiations, Dr. Al-Arian executed a written plea agreement on February 28, 2006. Pursuant to this agreement, Dr. Al-Arian committed to pleading guilty to Court 4 of the Superseding Indictment. The narrative of this count largely dealt with a statement that Dr. Al-Arian made to a reporter and his support with an immigration matter for a person "associated" with the Palestinian Islamic Jihad (PIJ). The count notably did not admit to any of the core terrorism charges levied against him regarding alleged leadership in PIJ and the other terrorism acts. Dr. Al-Arian was sentenced to a 57-month term of imprisonment on May 1, 2006.

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[1] In fact, as evidence of the high-profile nature of the case, then-Attorney General Ashcroft called an unorthodox press conference to announce Dr. Al-Arian's arrest. Ashcroft had publicly and repeatedly cited the prosecution as a major victory in his administration. *See, e.g.*, Paul Lomartire, *Professor Says Terrorism Arrest 'All About Politics,'* Cox News Service, Feb. 20, 2003. A movie has since been made of the trial and hundreds of articles have appeared in local and national publications regarding the case.

The trial loss and plea agreement was viewed as a significant defeat for the Justice Department.[2] In the immediate aftermath of the settlement and public criticism, prosecutors set out to call Dr. Al-Arian to a grand jury despite his prior insistence that he would not cooperate in such an investigation as a condition of his plea agreement.

The record in the case supports Dr. Al-Arian's assertion that non-cooperation was the central issue in negotiations between him and the government. On November 6, 2006, AUSA Terry Zitek acknowledged that Dr. Al-Arian was adamant that he would not testify, stating

> The Defendant Al-Arian says, "I don't want to cooperate." So we say, We won't put a cooperation provision in there. It's not in there and we're not talking about complaining that the Defendant Al-Arian has refused to cooperate.

See Tr. of November 6, 2006 Before J. Moody, Middle District of Florida, at 22. In February 2006, Dr. Al-Arian entered into a written plea agreement with the

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[2] *See, e.g.*, Tim Padgett, *When Terror Charges Just Won't Stick; A Jury Vindicates a Fiery Pro-Palestinian Professor, Did the Feds Just Waste Their Time?* Time, Dec. 19, 2005; *see also* Jonathan Mahler, *A Bellwether for the Power of a President*, New York Times, Mar. 26, 2006, at 4. U.S. Attorney Paul Perez took the unusual step of arguing the prosecution's side in the sentencing hearing. Perez later said it was his first time arguing a criminal case in a courtroom in more than four years. "This is probably the most important case I've had in my office since I became U.S. attorney," he said. Elaine Silvestrini, *Judge Rebukes, Sentences Al-Arian*, Tampa Tribune, May 2, 2006.

U.S. Attorney's Office for the Middle District of Florida and the Counterterrorism Section of the Department of Justice.[3]

Dr. Al-Arian agreed to a longer period of incarceration precisely so that he could remove the standard cooperation provisions from the agreement. Indeed, the removal of the cooperation provisions was the only benefit that Dr. Al-Arian received for increased punishment. Moreover, there was no other reason why the cooperation provisions were conspicuously removed in the final agreement. The Eleventh Circuit later confirmed that a series of standard cooperation provisions were left out of the final plea agreement – further supporting the uncontradicted record on this point.

Nevertheless, on May 10, 2006, ten days after being sentencing as a result of the plea agreement, the United States Attorney's Office for the Eastern District of Virginia ("EDVA"), through Assistant United States Attorney Gordon Kromberg, obtained an order immunizing Dr. Al-Arian and compelling him to testify before a grand jury in the EDVA. This immunity order and compulsion was in direct contradiction with the terms of the plea agreement in light of the fact that the Petitioner had expressly negotiated a non-cooperation component to the final deal. It was immediately criticized by defense counsel and others as a classic "bait-and-switch" where the government first induced a plea on the

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[3] This plea agreement was binding on the entire Justice Department.

assurance of non-cooperation and then, once incarcerated, subpoenaed the individual to cooperate.

In support of a Motion to Enforce the Plea Agreement with the Florida District Court, Dr. Al-Arian submitted an affidavit from himself and an affidavit from one of his trial defense counsel, Linda Moreno, Esq., detailing how non-cooperation was an express and important part of the plea agreement negotiated with the government. (*See* App. 24 & 27.) It was due to the assurance of non-cooperation that Dr. Al-Arian agreed to plead to a single count after his acquittals in Tampa. With the removal of the cooperation provisions, the express assurance from the government was the inducement for his plea. The government did not factually contest this evidence and none of the Florida prosecutors have taken issue with Ms. Moreno's description of events leading up to the plea agreement.

On May 10, 2006, ten days after being sentencing as a result of the plea agreement, the Justice Department in Virginia. Five months after the Justice Department obtained an order immunizing Dr. Al-Arian and compelling him to testify, the Justice Department brought Dr. Al-Arian before the Virginia grand jury on October 18, 2006. Dr. Al-Arian filed a motion in the EDVA to quash the grand jury subpoena, asserting that his plea agreement protected him from cooperating and being required to testify before a grand jury in the EDVA.

Instead of rendering a decision on Dr. Al-Arian's motion, the Virginia District Court ordered Dr. Al-Arian to re-file his motion in the Middle District of Florida. Dr. Al-Arian complied and filed the Motion to Enforce the Plea Agreement with the

Florida District Court on October 26, 2006. At a non-evidentiary hearing held on November 6, 2006, the Florida District Court denied Dr. Al-Arian's motion. Despite the sworn statements from counsel and Dr. Al-Arian and the removal of the cooperation provisions, the trial court denied a defense motion for an evidentiary hearing. In doing so, the district court barred the only way that Dr. Al-Arian could establish that his plea agreement was based on the express government promise that he would not be required to cooperate or do anything other than serve the specified sentence before deportation.

On November 9, 2006, the Florida District Court entered a written order holding that Dr. Al-Arian's plea agreement lacked a non-cooperation provision such that the plea agreement did not prohibit the government from forcing Dr. Al-Arian to testify before a Virginia Grand Jury. (App. 18). Dr. Al-Arian appealed the Florida's District Court's November 9, 2006 order to the Eleventh Circuit Court of Appeals. The Eleventh Circuit affirmed the Florida District Court's November 9, 2006 order on January 25, 2008. (App. 1).

While Dr. Al-Arian's request for an evidentiary hearing was denied, the affidavits of Dr. Al-Arian and Ms. Moreno's stand uncontradicted. During the pendency of the appeal, the government filed a motion with the Court asking for a remand for an evidentiary hearing if the Court wanted to resolve the merits of the factual dispute over the meaning of the agreement. The government admitted that such factual matters could not be resolved on this record. Accordingly, the panel was presented with a record that established that the government had negotiated an agreement based on a non-cooperation

understanding. The issue was whether, assuming such a promise was made by the government, a court can refuse to consider such evidence in enforcing the written agreement or, at a minimum, hold an evidentiary hearing to allow a record to be established as to the existence of parol evidence. The panel ruled that it would not consider whether the parties clearly understood and agreed that Dr. Al-Arian would not be required to cooperate. Such extrinsic evidence – even if uncontradicted and unambiguous – was treated as irrelevant in the face of a written plea agreement.

Dr. Al-Arian was held in civil contempt for over a year for refusing to testify before the Virginia Grand Jury for the periods of November 16, 2006 through December 21, 2006 and January 22, 2007 and December 13, 2007. During this period of civil contempt, the prosecutors were repeatedly asked if they intended to bring criminal contempt charges once civil contempt status was lifted. They declined to respond in court. The Court granted a motion to lift the civil contempt order in December 2007 and Dr. Al-Arian was allowed to complete his sentence under the plea agreement. Shortly after completion of his sentence and after he was handed over to ICE for deportation under the plea agreement, Dr. Al-Arian was indicted for criminal contempt and is scheduled for trial in August 2008. Dr. Al-Arian's refusal to testify was based on his good-faith belief that his plea agreement prohibited the government from compelling his cooperation with the grand jury investigation.

REASONS FOR GRANTING THE WRIT

The circuits have developed a sharp division on the standards governing when parol evidence may be used in supplementing or interpreting the terms of a plea agreement. Given the widespread use of such plea agreements, these different standards create both uncertainty and unfairness in the criminal justice system. The court below – in analyzing the facts that suggested that the parties had agreed in drafting the plea agreement to purposefully eliminate any cooperation provisions – expressly sought some middle ground between the rulings of other circuits. The Eleventh Circuit ruled that "[p]arol evidence may be considered only [where] the language of the agreement is ambiguous or where government overreaching is alleged." *United States v. Al-Arian*, 514 F.3d 1184, 1191 (11th Cir. 2008).

The Eleventh Circuit's ruling directly conflicts with its sister circuits and adds a new standard to a body of case law that was already dangerously confused and conflicted.

Some of the circuits have flatly refused to apply the parol evidence rule to a written plea agreement where the defendant presents evidence that an oral agreement was omitted from the written plea agreement. These courts maintain that, even in plea agreements that contain integration clauses, "[b]ecause of the unique nature of a plea bargain, involving as it does the waiver of constitutional rights . . . the parol evidence rule should not be rigidly applied to bar evidence which would aid the trial court in properly construing the plea agreement. . . . Thus, evidence of . . . statements made by the

prosecution during the plea bargaining . . . would be admissible." *United States v. Swinehart*, 614 F.2d 853, 858 (3d Cir.), cert denied 449 U.S. 827 (1980)..

Conversely, other circuits have adopted a blanket rule that they are "not at liberty to consider such parol evidence, since the plea agreement contained an integration clause specifying that the agreement as written incorporated the complete understanding of the parties." *United States v. Malcolm*, No. 95-1087, 1997 U.S. App. LEXIS 13892, AT * 24 (6th Cir. June 9, 1997).

Other circuits have defined it differently, some stating that "the use of parol evidence to supplement the terms of an unambiguous written plea agreement is ordinarily frowned upon . . . [but] these rules [are] subject to exception in unusual cases." *Bemis v. United States*, 30 F.3d 220, 222 (1st Cir. 1994). The difference between the approaches is striking, and the instant case provides an appropriate vehicle to resolve these splits.

The split within the circuits is mature. The positions of nine of the circuits are well-defined and long-standing. This circuit split is one that can be resolved only by this Court.

I. THE CIRCUITS ARE DIVIDED ON THE QUESTION OF WHETHER PAROL EVIDENCE SHOULD BE CONSIDERED IN REVIEWING A PLEA AGREEMENT.

The courts of appeals are significantly divided on the issue of whether parol evidence may be used in reviewing plea agreements. Most recently, in the opinion below, the Eleventh Circuit held that the

court "must use objective standards to resolve a dispute over the meaning of terms in a plea agreement" and that "[p]arol evidence may be considered only where the language of the agreement is ambiguous or government overreaching is alleged." *Al-Arian*, 514 F.3d at 1191. This opinion did not align itself neatly with the decisions of other circuits – creating yet another approach to this common interpretive problem.

The First, Third, and Fourth Circuits have all stated or suggested that parol evidence may be considered in an effort to supplement or interpret the agreement between the parties.

> **First Circuit**: In *United States v. Alegria*, 192 F.3d 179 (1st Cir. 1999), the First Circuit held that "[i]f a plea agreement unambiguously resolves an issue, that usually ends the judicial inquiry." *Id.* at 183. The Court then stated, "[i]f, however, a plea agreement lacks clarity or is manifestly incomplete, the need to disambiguate may justify resort to supplementary evidence or other interpretative aids." *Id.* The Court found, however that because the agreement contained an integration clause, the "inquiring court should construe the written document within its four corners, 'unfestooned with covenants the parties did not see fit to mention.'" *Id.* at 185 (internal citations omitted).
>
> But prior to the First Circuit's ruling in *Alegria*, the Court had also stated that although "the use of parol evidence to

supplement the terms of an unambiguous written plea agreement is ordinarily frowned upon," this rule "is subject to exception in unusual cases." *Bemis*, 30 F.3d at 222. The *Bemis* Court cited a previous decision of this Court, which found "that a written contractual provision disclaiming the existence of additional promises, while deserving of 'great weight,' does not 'conclusively bar subsequent proof that such additional agreements exist and should be given force." *Id.* at 223 (quoting *Blackledge v. Allison*, 431 U.S. 63, 75 (1977)). Ultimately, the *Bemis* court found that the facts before presented the exception they had referred to and remanded the case for further proceedings. The *Alegria* court, which looked at the similar issue only a year later, did not discuss *Bemis* or *Blackledge*.

Third Circuit: In *United States v. Swineheart*, 614 F.2d 853, 858 (3d Cir. 1980), the Third Circuit stated that "[b]ecause of the unique nature of a plea bargain, involving as it does the waiver of constitutional rights, we believe the parol evidence rule should not be rigidly applied to bar evidence which would aid the trial court in properly construing the plea agreement." As a result, the Court found that "evidence of a prior draft plea agreement, or of statements made by the prosecution during the plea bargaining which sheds light on the meaning of a pertinent word or phrase in an

'integrated' plea agreement would be admissible." *Id.*

Fourth Circuit: In *United States v. Garcia*, 956 F.2d 41 (4th Cir. 1992), the Fourth Circuit held that a "no cooperation" term was enforceable where it had been memorialized in the Government's cover-letter to the defendant but not in the attached agreement itself. The Fourth Circuit found that "[s]trict application of the parol evidence rule might bar consideration of the cover-letter promise," but it determined that the Government should not benefit from a contract rule that would allow it to avoid fulfilling a written promise it admittedly had made. *Id.* at 44.

Similarly, in *United States v. White*, 366 F.3d 291 (4th Cir. 2004), the written plea agreement, which included an integration clause, did not state that the defendant's plea was conditional. *Id.* at 293. The defendant claimed that he believed that he was making a conditional plea, subject to the appeal of the denial of his suppression motion. The Fourth Circuit noted that "[p]roof of the Government's refusal to abide by such an oral promise [that defendant could conditionally plead] would clearly constitute evidence of 'government overreaching' or 'fraud in the inducement,' admissible without running afoul of the parol evidence rule." *Id.* at 295. The Fourth Circuit remanded the

> case for an evidentiary hearing on the issue of whether the government made an oral promise that the plea was conditional, based on the defendant's uncontradicted sworn allegation that the government made such a promise. *Id.* at 299-300.

In contrast, the Second, Fifth, Sixth, and Tenth Circuits have found that the parol evidence should not be considered, especially when the plea agreement contained an integration clause. These decisions squarely conflict with the First, Third, and Fourth circuit decisions.

> **Second Circuit**: In *In Re Altro*, 180 F.3d 372 (2d Cir. 1999), the Second Circuit considered whether the terms of a plea agreement can be supplemented by a defendant's asserted understanding that the agreement would exempt the defendant from having to provide grand jury testimony, notwithstanding the absence of any written or oral promise by the government to that effect. *Id.* at 373. Unsurprisingly, the Second Circuit found that such an understanding cannot be enforced as part of the plea agreement, particularly because the written agreement included an integration clause. *Id.* at 376.
>
> The *Altro* court does not, and the Second Circuit has not yet addressed, whether a court must consider parol evidence relating to a written plea agreement where the defendant has evidence, and

not just his understanding, of an oral non-cooperation promise made by the government, as in the instant case.

Fifth Circuit: In *United States v. Cantu*, 225 Fed. Appx. 301 (5th Cir. 2007), the Fifth Circuit restated the general rule that "although circumstances surrounding the agreement's negotiations might indicate the parties' intent, "parol evidence is inadmissible to prove the meaning of an unambiguous plea agreement." *Id.* at 301 (quoting *United States v. Ballis*, 28 F.3d 1399 (5th Cir. 1994)).

Sixth Circuit: In *United States v. Malcolm*, No. 95-1087, 1997 U.S. App. LEXIS 13892 (6th Cir. June 9, 1997), it was the government who sought to use parol evidence, instead of the defendant. The plea agreement between the parties provided that the government would recommend a 27-month sentence if Malcolm "[kept] up his current level of cooperation." *Id.* at *24. The agreement separately provided that Malcolm would pay restitution in an amount to be determined by the Probation Department. The written plea agreement did not indicate that Malcolm was required to complete his restitution payments before the sentencing hearing, or that Malcolm waived his right to contest the Probation Department's calculations. *Id.* Despite this, the government made just such an argument and relied on the subsequent

statements of an Assistant United States Attorney in advancing an alternative interpretation of the agreement. In considering the issue, the Sixth Circuit cited the *Bemis* decision and stated that "we are not at liberty to consider such parol evidence, since the plea agreement contained an integration clause specifying that the agreement as written incorporated the complete understanding of the parties." *Id.*

Tenth Circuit: In *United States v. Rockwell Intl'l Corp.*, 124 F.3d 1194 (10th Cir. 1997), *cert. denied*, 523 U.S. 1093 (1998), the defendant, a corporation, entered into a plea agreement whereby the company would agree to various environmental crimes and would pay a substantial fine. In return, the government agreed to refrain from further criminal and, to a lesser extent, civil proceedings. *Id.* at 1196. The government later attempted to intervene in a qui tam action against Rockwell, which the company claims was in violation of the plea agreement. The Tenth Circuit, finding that the plea agreement contained an integration clause, stated that "the parol evidence rule bars the court from considering evidence of terms outside of an integrated written agreement." *Id.* at 1199.

In addition to this clear split between the majority of the circuits, the Seventh Circuit, like the Eleventh Circuit in the case below, added specific

additional requirements before parol evidence can be used to supplement a written plea agreement.

> **Seventh Circuit**: In *United States v. Ingram*, 979 F.2d 1179 (1992), *cert. denied*, 507 U.S. 997 (1993), the defendant argued that drug charges brought against him in Wisconsin were precluded by a plea agreement he had entered into with Colorado authorities. The defendant contended that the charges were related and that he had been promised by prosecutors (i.e. government overreaching) during plea negotiations that the government would not prosecute him anywhere for any other criminal activity that had already occurred in connection with those crimes. The government disputed the defendant's account. The Seventh Circuit, citing the seminal case, *Santobello v. New York*, 404 U.S. 257 (1971) stated that "[t]he government must fulfill any promise that it expressly or impliedly makes in exchange for a defendant's guilty plea." *Id.* at 1184. The court then stated that because plea agreements are "unique contracts," if a plea agreement is "unambiguous on its face, courts may refuse to enforce it if the government is found guilty of overreaching." *Ingram*, 979 F.2d at 1184. Although the court did not specifically defined overreaching, it implicitly implied that purposeful misleading the defendant or "muscling" the defendant into the agreement, would suffice. Finding a lack of evidence

regarding overreaching in that specific case, the Seventh Circuit affirmed the conviction of Ingram.

Adding to this confusion, the Ninth Circuit has its own intra-circuit split on this issue, issuing two different opinions, only a year apart, with different outcomes and without discussing each other.

Ninth Circuit: In *United States v. Singleton*, No. 94-10474, 1995 WL 66792 (9th Cir. Feb. 16, 1995), the defendant, during pretrial proceedings, refused to consider any plea offer that required his cooperation with the government. The government eventually dropped its demand for cooperation and the parties reached a plea agreement. The written plea agreement did not include a non-cooperation clause, but did contain an integration provision. *Id.* at *2. Despite the integration provision, the *Singleton* court upheld the trial court's refusal to issue an order of civil contempt against the defendant who refused to comply with a grand jury subpoena on the grounds that his plea agreement contained a non-cooperation term. *Id.* at **3-4. The Ninth Circuit found that the trial court's consideration of parol evidence in the form of its own observation of the plea discussion was proper despite both the integration clause and the unambiguous nature of the written plea agreement. *Id.*

Only one year later, in *United States v. Ajugwo*, 82 F.3d 925 (9th Cir. 1996), *cert.*

> *denied* 519 U.S. 1079 (1997), the Ninth Circuit again revisited the issue, although they made no reference to the *Singleton* decision. In *Ajugwo*, the defendant argued that the government had made verbal promises during plea negotiation and had since reneged on those promises. *Id.* at 928. The government disputed that these promises were made. *Id.* The Ninth Circuit stated that they refused to "consider parol evidence for the purpose of adding terms to or changing the terms of an integrated plea agreement." *Id.* (quoting *United States v. Pacheco-Osuna*, 23 F.3d 269, 271 (9th Cir. 1994)).

The courts of appeals are, therefore, deeply divided. The First, Third, and Fourth Circuits provide that parol evidence may be used to supplement written plea agreements, even when those agreements are unambiguous. The Second, Fifth, Sixth, and Tenth Circuits strictly hold that such evidence cannot be utilized and that the written agreements must be looked at in isolation. The Ninth Circuit has its own intra-circuit split and the Seventh and Eleventh Circuits now allow for the admission of parol evidence when government overreaching can be shown. Moreover, as noted below, this is not some arcane or rare controversy. Plea agreements are reached in tens of thousands of cases every year. However, the standard applied to these agreements differs radically from circuit to circuit.

II. THE CIRCUIT SPLIT PRESENTS AN IMPORTANT QUESTION AS TO WHETHER PAROL EVIDENCE MAY BE USED IN DETERMINING THE SCOPE AND TERMS OF A PLEA AGREEMENT.

Whether or not parol evidence can be used to supplement or interpret a written agreement, even when an integration clause is present, is a crucial question that significantly affects how plea agreements are structured, negotiated, and ultimately agreed to by defendants and the government. This Court needs to address this issue precisely because plea agreements are unique contracts that focus on constitutional issues. Moreover, predictability and uniformity regarding the use of parol evidence in supplementing plea agreements is crucial to facilitating and promoting the use of future plea agreements.

A. Plea Agreements Are Unique Constitutional Contracts That Waive Defendants' Rights, And This Court Is The Appropriate Forum For Maintaining the National Uniformity of Constitutional Contract Rights.

1. Plea Agreements Are Unique Constitutional Contracts That Waive Defendants' Most Fundamental Rights.

Plea agreements and standard contracts share many characteristics, but this Court has recognized that plea agreements are unique contracts because they "'involve a quid pro quo between a criminal

defendant and the government in which a waiver of constitutional rights (including the right to a trial) [is] exchanged for a perceived benefit[.]'" *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 44 (2006) (citations omitted) (footnote omitted); *see also Corpus v. Estelle*, 414 U.S. 932, 933 (1973) ("A guilty plea constitutes a waiver of several fundamental rights, among them the right to jury trial.") (Douglas, J. dissenting from denial of petition for certiorari). Accordingly, this Court has held that plea agreements are "constitutional contracts" and, unlike contracts in other spheres, they must "be construed in light of the rights and obligations created by the Constitution." *Ricketts v. Adamson*, 483 U.S. 1, 16 (1987). Following these warnings, lower courts regularly acknowledge the potential impact on underlying constitutional issues when interpreting plea agreements. *See e.g., United States v. Newbert*, 504 F.3d 180, 185, n.3 (1st Cir. Me. 2007) ("plea agreements implicate broader societal interests, some of constitutional magnitude"); *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986) ("the defendant's underlying 'contract' right [in a plea agreement] is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law").

The most significant right a defendant waives in a plea agreement is his right to a jury trial. This Court has repeatedly held that this is one of our most fundamental rights. *See Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) ("right to jury trial is fundamental to our system of criminal procedure"); *Apprendi v. New Jersey*, 530 U.S. 466, 548 (2000) ("the right to trial by jury was critically important in criminal cases"); *Burch v. Louisiana*, 441 U.S. 130,

132 (1979) ("the right of trial by jury was a fundamental right"); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (the nation has a "deep commitment . . . to the right of jury trial in serious criminal cases"). Indeed, the right to a trial by jury in a federal case was so critical to the framers of our constitution that it is protected by two separate constitutional provisions. *See Johnson v. Louisiana.*, 406 U.S. 356, 369 n.4 (1972) (trial by jury in federal cases assured by the Sixth Amendment and by Art. III, § 2, of the Constitution).

2. Since The Rights Waived in Plea Agreements Are So Important, This Court Should Maintain Uniformity In Interpretation of Those Agreements.

Judicial construction of plea agreements implicates such important constitutional rights that courts should employ uniform methods of construction and interpretation. Plea agreements are the one situation where an individual freely gives up those rights that this Court and society has gone to great lengths to establish, define and protect. It is for this reason, that it is essential that there be consistency among the circuits when it comes to interpreting problems that are brought forth in plea agreements. *See Witt v. Wainwright*, 470 U.S. 1039, 1042 (1985) (this Court "will certainly grant certiorari to resolve . . . a clear split in the Courts of Appeals on an issue of constitutional law whose importance to the administration of the States' criminal justice systems is undoubted") (Marshall, J. dissenting from denial of petition for certiorari). Otherwise, the extent of criminal defendants' constitutional rights could depend on the Circuit or

District in which they were charged. Such outcomes are fundamentally unfair.

The facts of this case exemplify the potential unfairness that can result when constitutional rights and a defendant's ability to protect those rights differ from one jurisdiction to the next. When Dr. Al-Arian received a subpoena to testify before a grand jury in the Eastern District of Virginia, he moved that court for an order quashing the subpoena. The basis for that motion was that Dr. Al-Arian had previously entered into a plea agreement with the U.S. Attorney's Office in the Middle District of Florida because he was assured that he would not be compelled to testify in any future cases. Instead of deciding Dr. Al-Arian's motion on the merits, the Virginia District Court ordered him to re-file his motion in the Middle District of Florida.

Dr. Al Arian's motion was then denied, and on appeal the United States Court of Appeals for the Eleventh Circuit said that in construing plea agreements, "parol evidence may be considered only where the language of the agreement is ambiguous or when government overreaching is alleged." 514 F.3d at 1191. As a result, Dr. Al-Arian was unable to use extrinsic evidence to show that his plea agreement contained a non-cooperation term. Specifically, the court refused to consider Dr. Al-Arian's submission of AUSA Terry Zitek's November 6, 2006 statement about the Government's response to Dr. Al-Arian's desire not to testify in future cases:

> so we sa[id], we won't put a cooperation provision in there. It's not in there and we're not talking about complaining

> that the Defendant Al-Arian has refused to cooperate.

See Tr. of November 6, 2006 Before J. Moody, Middle District of Florida, at 22.

Unlike the Eleventh Circuit, the Fourth Circuit rule allows courts to consider evidence of Government promises regarding plea bargains even when they are not written in the agreement itself. *See United States v. Garcia*, 956 F.2d 41 (4th Cir. 1992) (a "no cooperation" term was enforceable where it was memorialized only in the Government's cover-letter). Therefore, if the Virginia District Court had kept the motion instead of ordering Dr. Al-Arian to re-file it in the Middle District of Florida, AUSA Zitek's statements could have been admissible as evidence of the complete plea agreement between Dr. Al-Arian and the Government.

In short, in the Fourth Circuit Dr. Al-Arian would have been able to submit his most powerful evidence but, in the Eleventh Circuit, he was not. And that evidence—evidence showing that he had an agreement with the Government that he would not be forced to testify in future cases—potentially could have helped him avoid civil confinement and being criminally indictment for refusing to testify in response to immunity orders Moreover, although the facts of this case may present the archetype for detrimental effects of a circuit split, Dr. Al-Arian is certainly not alone, as any criminal defendant who enters into a plea agreement could face the same uncertainty about his ability to enforce that plea agreement and protect his constitutional rights.

III. THE DENIAL OF AN EVIDENTIARY HEARING TO ESTABLISH THE MEANING OF A PLEA AGREEMENT IS AN IMPORTANT QUESTION THAT CAN ONLY BE ANSWERED BY THIS COURT.

The division among the circuits also relates to the procedural question of the right of a defendant to an evidentiary hearing on the existence of an oral agreement with respect to a plea. Even in the Eleventh Circuit where the court tried to adopt a middle ground between the divided circuits, the court still upheld the lower court's denial of an evidentiary hearing. While the record was uncontested as to the express promise made by the government to induce Dr. Al-Arian to sign the plea agreement, the court still found that he did not have a right to an evidentiary hearing to establish that fact. Thus, the court produced the perfect "catch-22": a defendant can use parol evidence in some circumstances to supplement a plea agreement but cannot have an evidentiary hearing to establish such evidence -- and, therefore, cannot supplement a plea agreement

In any plea agreement dispute, the relevant evidence will usually be confined to communications between counsel for the government and the defendant. While the defense side of these disputes can be established (as here) through affidavits, only an evidentiary hearing can weigh the respective accounts of both sides to the dispute. The denial of such a hearing denies a defendant the ability to show that a plea agreement was a classic "bait and switch" where the government knowingly misled a defendant and/or counsel.

Under the approach of some circuits, a plea agreement would be enforced without a hearing even if such a hearing might show that the government used deceit or misrepresentation to secure consent for a plea. In the instant case, the uncontradicted record contains an allegation from both the defendant and counsel that the government promised that Dr. Al-Arian would not be required to cooperate in any respect with future investigations. This promise was reinforced by the government by deleting cooperation provisions from the standard plea agreement.

The Eleventh Circuit ruling puts it at odds with other circuits. For example, in *United States v. White*, the Fourth Circuit held that a prisoner was entitled to an evidentiary hearing to determine if a promise was made for a conditional plea that was not reflected in the written plea agreement. 366 F.3d at 300-02. Notably, unlike the instant case, the Court was not faced with sworn statements supporting the allegations, but still found an evidentiary hearing was mandated. *Id.* at 302 ("Although neither defense nor Government counsel has directly attested under oath to the existence of an oral agreement (nor were they questioned about the agreement during the Rule 11 hearing), both have made *express* representations in their court submissions, acting as officers of the court, and those representations directly contradict each other."); *see also United States v. Carter*, 454 F.2d 426, 427 (4th Cir. 1972), *cert. denied* 417 U.S. 933 (1974). In *Carter*, the Fourth Circuit mandated that it is the obligation of courts to determine the true understanding of the parties: any concern that

> that an United States Attorney may unreasonably bargain away the government's right and duty to prosecute . . . [can be addressed through] the administrative controls which the Attorney General of the United States may promulgate to regulate and control the conduct of cases by the United States Attorneys and their assistants. The solution does not lie in formalisms about the express, implied or apparent authority of one United States Attorney, or his representative, to bind another United States Attorney and thus to visit a sixteen year sentence on a defendant in violation of a bargain he fully performed. There is more at stake than just the liberty of this defendant. At stake is the honor of the government[,] public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government.

Id. at 428. Likewise, the Third Circuit adopted the Fourth Circuit's approach over the approach of other circuits in determining the true meaning of terms in a plea agreement through evidentiary hearings when necessary *United States v. Gebbie*, 294 F.3d 540 (3d Cir. 2002).[4]

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[4] Like the instant case, the plea agreement in *Gebbie* involved a defendant being called to answer substantially the same questions in a different jurisdiction. *Gebbie*, 294 F.3d at 543 ("Before the plea agreements in Ohio were finalized, the U.S. Attorney for the Southern District of Ohio and defense

As noted above, other circuits adopt a blanket approach on parol evidence (which also effectively bars evidentiary hearings). This further magnifies the split among the circuits where defendants in some states can establish, and prevail upon, evidence of the intended meaning of plea agreements. In other circuits, a defendant is either expressly or effectively barred from establishing a "bait and switch," even with sworn statements from officers of the court that the government misled a defendant into signing an agreement.

As with the question of the use of parol evidence, the right to an evidentiary hearing on the meaning of a plea agreement is a question with important implications for the entire judicial system. Where, as here, a credible allegation has been made – supported by a sworn statement from counsel – the defendant should be entitled to an evidentiary hearing to establish a record for review. Such hearings would only be required upon a showing of a credible allegation of a material oral agreement or misrepresentation by the government. It is in the interests of justice that the Court establish a single consistent rule for the waiver of core constitutional rights in plea agreements.

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counsel learned that the U.S. Attorney for the Western District of Pennsylvania was investigating Defendants. They made an attempt to resolve all potential charges in a global agreement among the Northern District of Ohio, the Southern District of Ohio, the Western District of Pennsylvania, and Defendants, but the U.S. Attorney's Office for the Western District of Pennsylvania believed it was investigating crimes other than those committed in Ohio, so it declined to enter into an agreement.")

The case of Dr. Sami Al-Arian shows the danger of allowing this type of "bait and switch" technique. Dr. Al-Arian was literally deprived of all of the specific benefits that he demanded as part of the agreement. He was ultimately held for a year beyond the agreed upon sentence and, after serving that period of civil confinement, he was then charged criminally to prevent him from being deported. He was refused an evidentiary hearing despite that fact the plea agreement reflected obvious negotiations on the issue of cooperation – a fact admitted by the government. There was no reason for the removal of the standard cooperation provision except Dr. Al-Arian's insistence that he did not want to assist the government and wanted to limit his obligation under the agreement to the completion of the sentence on the single count. He "paid" for this condition through a longer sentence of incarceration.

Courts should not be accomplices to such traps by barring defendants from establishing the true agreement of the parties. In addition to protecting the constitutional rights of defendants, basic notions of judicial integrity and fairness demand some recourse of defendants who face "bait and switch" tactics in criminal cases. The supervisory power of the courts require courts to determine if misrepresentation occurred to protect the integrity of the courts. *See United States v. Payner*, 447 U.S. 727, 736 n.8 (1980). Courts cannot create a condition of willful blindness to compelling evidence that the government induced a defendant to waive core rights on a false assurance or understanding. This includes, as in this case, the refusal of a court to require prosecutors to go on the record as to what they specifically told a defendant would be the effect of a plea in terms of future investigations and

possible prosecution. Whatever rule emerges, it is in the interest of justice that the rights of defendants do not fluctuate wildly from jurisdiction to jurisdiction. Given the ubiquitous role of plea agreements in the legal system, a single approach should govern all disputes in all courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. _____

In The
Supreme Court of the United States

DR. SAMI AMIN AL-ARIAN

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For the Eleventh Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-16008

D. C. Docket No. 03-00077-CR-T-30-TBM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SAMI AMIN AL-ARIAN,
a.k.a. Amin,
a.k.a. Abu Abdullah,
a.k.a. The Secretary,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(January 25, 2008)

Before BIRCH and BARKETT, Circuit Judges, and KORMAN,* District Judge.

PER CURIAM:

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* Honorable Edward Korman, United States District Judge for the Eastern District of New York, sitting by designation.

In this appeal, we decide whether a district court has jurisdiction to consider a defendant's post-conviction motion seeking specific enforcement of a plea agreement, which does not request recision of the plea. We also decide whether a plea agreement that contains no provisions exempting a defendant from cooperating with the government or providing future testimony can be interpreted to prohibit the government from issuing a grand jury subpoena to the defendant. Sami Amin Al-Arian appeals the district court's denial of his motion to enforce plea agreement, in which he argued that, in exchange for his guilty plea, the government agreed never to seek his testimony on any other matters, whether offered voluntarily or compelled by a subpoena. After the district court found that it had jurisdiction over the motion, it found that the plea agreement is clear, unambiguous, and contains no agreement that Al-Arian is immune from a future grand jury subpoena. Therefore, the district court determined that the plea agreement does not prevent the government from subpoenaing Al-Arian to testify before a grand jury. For the following reasons, we AFFIRM.

I. BACKGROUND

Al-Arian was indicted in the Middle District of Florida on multiple counts of activity related to international terrorism, including conspiracy to commit racketeering, conspiracy to murder, maim, or injure persons at places outside the United States, conspiracy to provide material support to a designated foreign terrorist organization (the Palestinian Islamic Jihad), conspiracy to make and receive contributions of funds, goods, or services to or for the benefit of specially designated terrorists,

providing material support to a terrorist organization, money laundering, and obstruction of justice. In May 2005, after his jury trial resulted in acquittals on some counts and a hung jury on others, Al-Arian pled guilty to one count of conspiracy "to make or receive contributions of funds, goods or services to or for the benefit of the Palestinian Islamic Jihad . . . in violation of 18 U.S.C. § 371." R17-1563 at 1. He was sentenced to 57 months of imprisonment.

Al-Arian entered his guilty plea in the Middle District of Florida pursuant to a written plea agreement. The plea agreement provides that the "agreement is limited to the Office of the United States Attorney for the Middle District of Florida and the Counterterrorism Section of the Department of Justice and cannot bind other federal, state, or local prosecuting authorities." R17-1563 at 8. The plea agreement also contains an integration clause, establishing that the "plea agreement constitutes the entire agreement between the government and the defendant . . . and no other promises, agreements, or representations exist or have been made to the defendant or defendant's attorney with regard to such guilty plea." Id. at 14. The plea agreement contains no terms regarding whether Al- Arian agreed to cooperate with the government in the future, or whether he could be required to do so. At Al-Arian's plea hearing, the government informed the district court that prosecutors in the United States Attorney's Office for the Eastern District of Virginia had agreed that the plea agreement would bind that office, but only to the extent that Al-Arian would not be charged by that office with crimes known to it "at the time of the agreement related to

the conduct giving rise to the agreement." R124 at 18-19. During the plea colloquy, the district court asked Al- Arian whether he had been promised anything else by anyone to induce his guilty plea, and Al-Arian replied that he had not.

In May 2006, the United States District Court for the Eastern District of Virginia issued to Al-Arian a grand jury subpoena ad testificandum. The subpoena was served on Al Arian in early October 2006, and he filed a motion to quash the subpoena in the Virginia district court. Al-Arian argued that his plea agreement in the Florida district court prevented the government from forcing him to testify before the grand jury in Virginia. The government responded that the Florida district court, not the Virginia district court, was the proper court to adjudicate Al- Arian's motion and suggested that the Virginia district court should direct Al-Arian to file his motion in the Florida district court. SR1 at 6-8. The Virginia district court agreed and granted Al-Arian leave to file a motion to enforce the plea agreement in the Florida district court on or before 26 October 2006. SR1 at 10, 20-22.

Al-Arian timely filed his motion in the Florida district court and argued that he and the government agreed that he would not be required to cooperate with the government in any manner. That agreement is not documented in the plea agreement, but Al-Arian asserted that the government purposefully omitted the standard cooperation provisions from the plea agreement because the government acquiesced to his refusal to cooperate. According to Al-Arian, the absence of a cooperation provision in the plea agreement demonstrated that the government

agreed not to seek further testimony from him. Al-Arian contended that, in light of this agreement, his constitutional due process rights would be violated if he were compelled to testify before the grand jury in Virginia. Al-Arian requested that the Florida district court enforce the plea agreement and order specific performance of the non cooperation aspect of that agreement, which would bar the government from compelling his testimony. The government responded that the Florida district court lacked jurisdiction to consider the motion and that the plea agreement did not immunize Al-Arian from the grand jury subpoena.

The Florida district court conducted a hearing on Al-Arian's motion. The district court found that it had jurisdiction over the motion because Al-Arian sought "protection from the United States government" and that it did not matter which judicial district in which the dispute over the grand jury subpoena took place. R127 at 29-30. In a subsequent written order, the court held that Al-Arian's plea agreement was not ambiguous and did not prevent the government from issuing a subpoena compelling him to testify. Further, the court found that "cooperation" is not equivalent to compelled testimony, so that even if the plea agreement provided that Al-Arian would not have to cooperate, that would not necessarily mean that he could not be compelled to testify pursuant to a subpoena. R17-1666 at 1-2.

Al-Arian appealed the Florida district court's order to this court. Subsequently, the Virginia district court found that Al Arian had no legal basis on which to refuse to comply with the subpoena,

granted the government's motion to hold Al-Arian in civil contempt, denied Al-Arian's motion to stay the contempt proceedings during the pendency of this appeal, and ordered Al Arian's criminal sentence to be tolled until he testified before the grand jury. Al-Arian appealed his contempt citation to the United States Court of Appeals for the Fourth Circuit, which affirmed the Virginia district court's order. In May 2007, Al-Arian filed an unopposed motion for expedited consideration and resolution of his appeal with this court. We held oral argument in this case on 11 September 2007.[1] On 14 December 2007, the Virginia district court vacated its contempt order.

II. DISCUSSION

A. Jurisdiction

1. Mootness

Article III of the Constitution limits the jurisdiction of the federal courts to the consideration of "Cases" and "Controversies." U.S. CONST. art. III, § 2. A case on appeal becomes moot, and ceases to be a case or controversy, "when it no longer presents a live controversy with respect to which the court can give meaningful relief." Al Najjar v. Ashcroft, 273 F.3d 1330, 1336 (11th Cir. 2001) (per curiam) (internal quotation and citation omitted). Thus, mootness is jurisdictional, and the court must resolve any question of mootness before it assumes jurisdiction. Id. (quotations and citations omitted). The fundamental question with respect to mootness is whether events have "occurred subsequent to the

[1] We unsealed the proceedings in this case immediately prior to oral argument.

filing of . . . an appeal [that] deprive the court of the ability to give the . . . appellant meaningful relief." Id. (citation omitted). "Whether a case is moot is a question of law that we review de novo." Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1182 (11th Cir. 2007).

We conclude that this case is not moot because we have the ability to afford meaningful relief to Al-Arian, even though the Virginia district court already vacated its contempt order. The Virginia district court's contempt order provided that Al-Arian's sentence imposed pursuant to his guilty plea would be tolled until he purges that contempt by testifying before the grand jury. If we were to find that Al-Arian's plea agreement immunizes him from the grand jury subpoena, and the Virginia district court erred by holding him in contempt, the time Al-Arian served pursuant to the civil contempt order would be credited towards the sentence he is serving pursuant to his guilty plea. Hence, this appeal is not moot. In re Grand Jury Proceedings (Knight), 588 F.2d 429 (5th Cir. 1979) (per curiam) (concluding that appeal from a civil contempt conviction is not mooted by a subsequent order vacating that conviction because contempt conviction tolled criminal sentence); In re Grand Jury Witness (Altro), 180 F.2d 372, 375 n.3 (2d Cir. 1999) (deciding that appeal is not moot where conclusion that civil contempt order was erroneously entered would credit contempt sentence toward criminal sentence); Mosley v. United States, No. 92-1263, 1994 WL 246077, at *1 (7th Cir. June 3, 1994) (same).

2. Subject Matter Jurisdiction

Next, we must determine whether the district court had subject matter jurisdiction over Al-Arian's motion to enforce his plea agreement. Williams v. Best Buy Co., 269 F.3d 1316, 1318 (11th Cir. 2001) (stating that '[a]ppellate courts have a responsibility to examine the subject matter jurisdiction of the district courts in actions that they review."). We review questions concerning a district court's subject matter jurisdiction de novo, Mesa Valderrama v. United States, 417 F.3d 1189, 1194 (11th Cir. 2005), and we may affirm "for any reason supported by the record, even if not relied upon by the district court." Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1284 (11th Cir. 2007). We also must determine whether, and to what extent, we have jurisdiction in this appeal. Russell Corp. v. Am. Home Assurance Co., 264 F.3d 1040, 1043 (11th Cir. 2001) ("This court has a duty to independently examine our appellate jurisdiction and dismiss when our jurisdictional limits are exceeded.").

Whether the district court possessed jurisdiction over Al-Arian's motion is a matter of first impression in our circuit. The government argues that the district court lacked jurisdiction to consider Al-Arian's motion to enforce plea agreement and, even if it did have jurisdiction over the motion, its order was neither final nor appealable since it imposed no restriction upon Al-Arian. Consequently, the government argues either that we have jurisdiction only to find that the district court lacked jurisdiction over Al-Arian's motion, or that we lack jurisdiction altogether to consider this appeal. Al-Arian offers several bases for the district court's

jurisdiction, including 28 U.S.C. § 2255. Al-Arian argues that we have jurisdiction both to review the district court's order and to address his motion on its merits.

As an initial matter, the district court's order is final and appealable. The district court's order denying Al-Arian's Motion to Enforce Plea Agreement is an adjudication of the terms of a contract, the plea agreement, entered into by Al-Arian and the government. The district court resolved all of Al-Arian's claims, and there is no further action to be taken by the district court in this case. Thus, we have jurisdiction to consider this appeal. See 28 U.S.C. § 1291; Delaney's, Inc. v. Illinois Union Ins. Co., 894 F.2d 1300, 1304 (11th Cir. 1990).

The next question concerns the extent of our jurisdiction in this case –whether or not we may address the merits of Al-Arian's motion and how we may do so.[2] In Santobello v. United States, 404 U.S. 257, 92 S. Ct. 495 (1971), the Supreme Court held "that when a plea rests in any significant degree on a promise . . . of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Id. at 262, 92 S. Ct. at 499. Due process requires the government to adhere to the promises it has made in a plea agreement. United States v. Harvey, 869 F.2d 1439, 1443 (11th

[2] The government moved for a limited remand to the district court if we were to reach the merits of Al-Arian's appeal and were required to resolve a factual issue based on evidence not in the record on appeal. Since we do not need to resolve any such factual issues, a limited remand is not needed. The government's motion is denied.

Cir. 1989) (en banc). In Santobello, the defendant entered a guilty plea in reliance on the prosecutor's promise not to make a sentencing recommendation. Santobello at 257, 92 S. Ct. 495. At the sentencing hearing, the prosecutor who negotiated the plea was replaced by another prosecutor, who recommended a maximum sentence of one year of imprisonment. Id. at 259, 92 S. Ct. at 497. The court sentenced the defendant to one year in prison. On direct appeal, the Supreme Court concluded that, in the event that the government does not honor its end of the bargain which induced a guilty plea, the court that sentenced the defendant has the discretion to fashion an appropriate remedy, i.e., whether to order specific performance of the plea agreement or to allow the defendant to withdraw his guilty plea. Id. at 262-63, 92 S. Ct. at 499. Therefore, in Santobello, the Supreme Court implicitly recognized that the court that accepts a guilty plea has jurisdiction to enforce a plea agreement if the government is in breach. See id.

We followed Santobello in In re Arnett, 804 F.2d 1200 (11th Cir. 1986) (per curiam). In Arnett, the defendant pled guilty to a single count of possession of marijuana and cocaine with intent to distribute. Id. at 1201. The defendant's plea agreement provided that he would forfeit $3,000 found on his person when he was arrested. Id. After the district court accepted the defendant's plea, but before he was sentenced, the government sought forfeiture of the defendant's house and farm. Id. The defendant filed a writ of mandamus and argued that the government's actions violated the plea agreement, and he sought specific performance of the agreement, or, in the alternative, to rescind his plea.

We agreed that the government violated the terms of its plea agreement with the defendant, stating: "[w]here the government has not honored a plea agreement, the fashioning of an appropriate remedy is left to the sound discretion of the court." Id. at 1204 (citing Santobello, 404 U.S. 257). We further stated that "[t]his circuit follows the principles enunciated in Santobello by requiring that the government adhere strictly to the terms of plea agreements," id., but we did not explicitly hold that the district court had jurisdiction over the defendant's motion to enforce a plea agreement.

We now conclude, as have the First and Seventh Circuits, that a § 2255 motion may be used to enforce promises made in a plea agreement. Bemis v. United States, 30 F.3d 220, 221 (1st Cir. 1994) ("we believe that habeas corpus provides an appropriate procedural vehicle for advancing a Santobello claim"); Bischel v. United States, 32 F.3d 259, 264 (7th Cir. 1994) (petitioner satisfied § 2255's jurisdictional requirement by claiming that he relied to his detriment on the government's alleged promise to seek a sentencing reduction). Al-Arian claimed in his motion that he pled guilty in reliance on the government's alleged promise never to require his cooperation in any future capacity. Al-Arian's motion was filed within one year of the date on which he was subpoenaed, see 28 U.S.C. § 2255, and his claim satisfies the jurisdictional element of § 2255 because, if the government actually made and breached such a promise, Al-Arian is serving a federal sentence in violation of his constitutional due process rights. Harvey, 869 F.2d at 1443. The motion was properly filed in the Florida district court because Al-Arian entered his guilty plea in that court. See Rule 3(b),

Rules Governing § 2255 Cases. Accordingly, we hold that the district court in which a defendant pled guilty pursuant to a written plea agreement has jurisdiction over a motion filed by the defendant to enforce the agreement under § 2255. The Florida district court had jurisdiction over Al-Arian's motion, and we may review the merits of that motion.

B. Breach of the Plea Agreement

Al-Arian argues that, in exchange for his guilty plea, the government agreed never to seek his cooperation in any future matter, and that the government breached this agreement by subpoenaing him to testify before a grand jury in the Eastern District of Virginia. Whether the government has breached a plea agreement is a question of law that we review de novo. United States v. Mahique, 150 F.3d 1330, 1332 (11th Cir. 1998) (per curiam). However, the district court's factual findings regarding the scope of the agreement will be set aside only if they are clearly erroneous. Raulerson v. United States, 901 F.2d 1009, 1012 (11th Cir. 1990). "The court must decide whether the government's actions are inconsistent with what the defendant reasonably understood when he entered his guilty plea." Arnett, 804 F.2d at 1202-03. The court must use objective standards to resolve a dispute over the meaning of terms in a plea agreement. Id. at 1202. Parol evidence may be considered only where the language of the agreement is ambiguous or government overreaching is alleged. Raulerson, 901 F.2d at 1012.

In In re Grand Jury Proceedings (Perdue), 819 F.2d 984 (11th Cir. 1987)(per curiam), we decided a

case presenting very similar facts. After Perdue pled guilty pursuant to a written plea agreement, the government subpoenaed him to testify before a grand jury and granted him immunity from prosecution based on his testimony. Purdue refused to testify and the district court held him in contempt. Id. at 985. Perdue appealed to this court, arguing that the government agreed that, in exchange for his guilty plea and acceptance of a longer sentence, the government would not require him to testify in other matters. Id. at 986. Because we decided that Perdue's plea "agreement simply [did] not contain any mention of future testimony, whether voluntary or compelled," we concluded that we would "not rewrite the agreement to include a bar on attempts by the government to compel testimony by Perdue." Id. at 987. Accordingly, we held that the plea agreement did not preclude the government from attempting to compel testimony from Perdue, and we so held even though we recognized that the government may have misled Perdue and that Perdue may have misunderstood the plea agreement. Id. at 986-87.

The Second Circuit reached the same result in a nearly identical case. In In re Grand Jury Witness (Altro), 180 F.3d 372 (2d Cir. 1999), a defendant refused to comply with a grand jury subpoena based upon his belief that his plea agreement afforded him immunity from the government's subpoena. The plea agreement contained no reference to future testimony, and the defendant did not establish that the government affirmatively made a "no-cooperation promise." Id. at 376. Instead, the defendant relied upon his understanding that the plea agreement contained an "implicit" promise that he would not

have to give grand jury testimony, based upon his course of dealing with the government. Id. at 375. The plea agreement contained an integration clause, providing that there were no other promised or understandings between the parties other than those written in the agreement. Id. at 373. On those facts, the Second Circuit concluded that the defendant could not rely on an "implicit understanding" that was not reflected in the plea agreement to demonstrate that the government had breached the plea agreement and affirmed the district court's order holding him in contempt. Id. at 376-77.

This case falls squarely within Perdue and Altro. Al Arian's plea agreement Contains no mention of whether he could be compelled to testify before a grand jury in the future. It also contains an integration clause, providing that the plea agreement reflects all of the promises and agreements between Al-Arian and the government. Notwithstanding the integration clause, Al-Arian argues that the plea agreement's lack of any provision related to future testimony is actually affirmative evidence that the government agreed, as part of the plea agreement, not to seek future testimony from him. According to Al-Arian, the government agreed to omit the "standard cooperation provision"[3] from the plea

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[3] The government filed a letter brief and attached the plea agreement provisions at issue in response to our request at oral argument. We note that the cooperation provisions are drafted such that cooperation includes testimony both provided voluntarily and compelled by a subpoena. However, because it is not necessary for us to decide in this appeal whether "cooperation" encompasses compelled testimony, we express no opinion as to whether the district court correctly found that

agreement because Al- Arian conditioned his guilty plea on his refusal to cooperate. Appellant's Br. 16. Thus, Al-Arian contends that removing that language from the plea agreement achieved the same result as including a provision immunizing him from having to give any future testimony. We disagree. The exclusion of a standard plea agreement provision requiring a defendant to cooperate with the government, whether voluntarily or under subpoena, does not establish that the government immunized Al-Arian from future grand jury subpoenas. This contention is especially dubious where, as here, the plea agreement contains an integration clause stating that there are no other promises, agreements, or representations except those set forth in the agreement, and Al-Arian denied at his plea hearing that he pled guilty in reliance on any promises or inducements except for those found in the agreement. In addition, the United States Attorney's Office for the Eastern District of Virginia only agreed to be bound by the plea agreement such that it would not prosecute Al-Arian for crimes known to that office at the time of the agreement; that office did not agree to immunize Al-Arian from any future grand jury subpoenas.[4] Given these aspects of the plea

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"cooperation" does not include testimony compelled by a subpoena.

[4] Al-Arian also argues that the United States Attorney's Office for the Eastern District of Virginia is bound by the plea agreement. We address this additional issue in further detail to explain that, even if the government had immunized Al-Arian from future grand jury subpoenas, neither the plea agreement itself nor the modification of that agreement made during the plea hearing in the district court extended any such immunity to subpoenas issued from the Eastern District of Virginia. The plea agreement expressly binds only the United States Attorney's Office for the Middle District of Florida and the

agreement and plea hearing, we cannot conclude that Al-Arian reasonably believed that he would forever be immune from all grand jury subpoenas originating from any federal prosecutor's office.

In this case, like Perdue, there is a clear conflict between Al-Arian's understanding of the plea agreement versus the government's understanding of it. Also like Perdue, Al-Arian alleges that he was at least unintentionally misled by the government into believing that he would not have to give any further testimony, and the government did not present any evidence to render Al-Arian's misunderstanding implausible. Perdue, 819 F.2d at 986. However, as we stated in Perdue, even "where the government arguably misled [Al-Arian], and where [Al- Arian] plausibly misunderstood the plea agreement, we cannot enforce an agreement that was never agreed on with specificity." Id. at 987. As we have explained, the plea agreement reflects no agreement between Al-Arian and the government that Al-Arian could not be compelled to give grand jury testimony. Consequently, we hold that the written plea agreement between Al-Arian and the government

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Counterterrorism Section of the Department of Justice. At the plea hearing, the agreement was orally modified to "further bind the Eastern District of Virginia such that, if the [c]ourt accepts the plea agreement, the United States Attorney's Office for the Eastern District of Virginia likewise will not charge [Al-Arian] with committing any other federal crimes known to that United States Attorney's Office at the time of the agreement." R124 at 18-19. This modification of the plea agreement binds the United States Attorney's Office Eastern District of Virginia only insofar as that office agreed not to prosecute Al-Arian for crimes known to that office at the time of the plea; it does not extend any purported immunity to Al-Arian from grand jury subpoenas.

does not prevent the government from issuing a subpoena to Al-Arian requiring him to testify before a grand jury.

III. CONCLUSION

Al-Arian appeals the district court's denial of his motion to enforce plea agreement, in which he argued that his plea agreement in the Middle District of Florida precluded the United States Attorney's Office for the Eastern District of Virginia from compelling him to testify before a grand jury. Al-Arian argues that, as consideration for his guilty plea, the government agreed never to seek his testimony on any other matters, whether provided voluntarily or compelled. Upon review, we hold that the district court had jurisdiction over Al-Arian's motion pursuant to § 2255. The plea agreement is clear, unambiguous, and does not grant Al-Arian immunity from a future grand jury subpoena. Therefore, we hold that the government did not breach the plea agreement by issuing a subpoena commanding Al-Arian to testify before a grand jury.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA	)	
v.	)	CASE NO:
	)	8:03-CR
	)	77-T-30TBM
SAMI AMIN AL-ARIAN	)	

ORDER

THIS CAUSE is before the Court upon Defendant Sami Amin Al-Arian's Motion to Enforce Plea Agreement (Dkt. #1652) and the Government's Response thereto (Dkt. #1659). The Court heard oral arguments on November 6, 2006.

Defendant's motion asserts that on October 19, 2006, Dr. Al-Arian was subpoenaed to appear before a grand jury in Alexandria, Virginia, to give testimony in an on-going investigation. Dr. Al-Arian declined to answer any questions contending that he was protected by his plea agreement from having to do so. Dr. Al-Arian's argument is that when he and his attorneys had negotiations with the Government to enter his guilty plea, it was made clear to the Government that he would not enter into a plea agreement requiring his cooperation. He argues further that, once he made it clear he would not cooperate, "the issue of cooperation was immediately taken off the table and never raised again."

First, cooperation is not the same as compelled testimony. Cooperation is the affirmative act of voluntarily coming forward with information useful to the Government in prosecuting other individuals (generally in return for some benefit such as a lower sentence). Compelled testimony is involuntarily having to give information under the threat of contempt. Of course, one cannot be compelled to give testimony that would incriminate one's self unless the Government grants immunity from prosecution. So, Dr. Al-Arian's contention was that he would not have to "cooperate," even if true, would have nothing to do with whether he, like everyone else, could be compelled to testify pursuant to a grand jury subpoena.

Second, contrary to Dr. Al-Arian's contention, the plea agreement does not provide that he does not have to cooperate much less provide that he would never had to respond to a grand jury subpoena. The Court has never heard of the Government agreeing that someone would forever be protected from grand jury subpoena. It is incredible that such a novel provision would not be placed in the written agreement in clear and specific terms. And, the contention that "the issue of cooperation was immediately taken off the table and never raised again" is contrary to the wording of paragraph six on page eight of the agreement which provides that, if Dr. Al-Arian does cooperate, such cooperation would be brought to the attention of other prosecuting officers if requested.

Dr. Al-Arian's contentions are similar to those raised in In Re: Grand Jury Proceedings (Perdue), 819 F.2d 984 (11th Cir. 1987). Like Al-Arian, Perdue

argued that his plea agreement protected him from having to respond to a grand jury subpoena. After observing that Perdue's written plea agreement did not contain any mention of future testimony, whether voluntary or compelled, the Eleventh Circuit ruled that Perdue must respond to the grand jury subpoena. In Perdue, the Eleventh Circuit went on to hold that, if the words of the agreement are unambiguous, a court "cannot rewrite the agreement to include a bar on attempts by the Government to compel testimony . . .." Perdue at 987.

Like in Perdue, the plea agreement before this Court is clear and unambiguous. It contains no agreement that Al-Arian is granted immunity from future grand jury subpoena. And, it contains an "integration clause" stating that it contains all the agreements between the parties. At his guilty plea hearing, Magistrate Judge McCoun specifically asked Defendant Al-Arian and his counsel whether the Government had made any other promises, to which Al-Arian (while under oath) and counsel responded in the negative.

Therefore, the Court determines that the written plea agreement between the Government and Dr. Al-Arian does not prevent the Government from subpoenaing him to testify before a grand jury.

It is therefore ORDERED AND ADJUDGED that Defendant Sami Amin Al-Arian's Motion to Enforce Plea Agreement (Dkt. #1652) is DENIED.

DONE and **ORDERED** in Tampa, Florida on November 9, 2006.

James S.
Moody, Jr.
United States
District Judge

Copies Furnished To:
Counsel/Parties of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-16008-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SAMI AMIN AL-ARIAN,
a.k.a. Amin,
a.k.a. Abu Abdullah,
a.k.a. The Secretary,

Defendant-Appellant.

On Appeal from the United States District Court for the
Middle District of Florida

Before BIRCH and BARKETT, Circuit Judges, and KORMAN,* District Judge.

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

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* Honorable Edward Korman, United States District Judge for the Eastern District of New York, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

Declaration of Sami Amin Al-Arian

Commonwealth of Virginia)
)
County of Richmond)

I, Sami Amin Al-Arian, do herby declare:

1. I make this declaration based on my own personal knowledge and conversations with Linda Moreno, Esq. and William Moffitt, Esq.

2. I was born on January 14, 1958 in Kuwait. I am currently 48 years old.

3. On February 28, 2006, I signed a plea agreement in settlement of *United States v, Sami Amin Al-Arian*, Case No. 8:03-CR-77-30TBM (M.D. Fla.).

4. My attorneys, William Moffitt, Esq. and Linda Moreno, Esq., negotiated the terms of my plea agreement and conveyed to me the substance of their conversations with the representatives of the United States government, including, Terence Zitek, Esq.; Cherie Krigsman, Esq.; Paul Perez, Esq.; Walter Furr, Esq; and Alexis Collins, Esq.

5. The overarching purpose of the plea agreement was to bring an end all business with the government regarding their investigation of me and my family, and since I could no longer live in the United States, to expedite my deportation. These were key inducements in my decision enter the plea agreement with the government.

6. From the outset of the plea negotiations, I made clear to my attorneys, and they in turn made clear to the government, that under no circumstances would I provide cooperation, in any form, to the government. In fact, I requested that certain language be excised from the initial drafts of the plea agreement that could be misconstrued as evidence that I had provided cooperation to the government.

7. It was my clear understanding that I would not be called upon by the government to provide cooperation in any fashion and this was a key motivation in my execution of the plea agreement.

8. During the plea colloquy on April 14, 2006, the government orally amended the plea agreement to bind the U.S. Attorney's Office for the Eastern District of Virginia to the plea agreement. It was my understanding, at the time the government orally amended the plea agreement, that the U.S. Attorney's Office for the Eastern District of Virginia was added to the parties bound by the agreement to prevent that office from bringing charges against me, holding me as a material witness, or calling me to testify before the grand jury investigating IIIT.

In conformity with 28 U.S.C. § 1746 I, Sami Amin Al-Arian, declare under penalty of perjury that the foregoing is true and correct. Executed on October 25th, 2006.

Signed: Sami Amin Al-Arian

County of Richmond
State of Virginia

Sworn and Subscribed to before me this 25th day of October, 2006

Signed: Notary Public
My Commission Expires

11/30/06

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 8:03-cr-77-30TBM

SAMI AMIN AL-ARIAN,

Defendant.
_____/

DECLARATION OF LINDA MORENO, ESQ.

I, Linda Moreno, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am an attorney duly licensed to practice in the state of Florida, and I was co-counsel with William Moffitt, Esq., for Dr. Sami Al-Arian in the above-entitled case.

2. Soon after Dr. Al-Arian's acquittals, Mr. Moffitt and I engaged in plea negotiations with the United States Attorney for the Middle District of Florida and the Department of Justice's Counterterrorism Division in Washington, D.C.

3. On January 4, 2006, I, along with Mr. Moffitt, met in Washington, D.C. at the Department of Justice with Alice Fisher, the head of the Criminal Division for the Office of Attorney General. Among others in attendance was Paul Perez, United States Attorney for the Middle District of Florida.

4. From the outset of negotiations with all parties involved, we conveyed Dr. Al-Arian's position of non-cooperation with the government. The government never rejected the defense's stance on this issue and it never asserted that Dr. Al-Arian could be forced to cooperate under the plea agreement or would be expected to do so voluntarily. The government knew Dr. Al-Arian would never enter a plea agreement where he would be expected to cooperate or forced to cooperate with the government, therefore, this issue was a non-starter. Accordingly, no cooperation provision was entertained by the parties or included in any draft of the plea agreement—though I believe cooperation paragraphs are standard provisions in the plea agreements used by the U.S. Attorney's Office for the Middle District of Florida. After plea negotiations commenced, and the non-cooperation element had been established, the subject of Dr. Al-Arian's cooperation was completely taken off the table and not revisited.

5. All throughout our negotiations, we also made it very clear that we were only discussing a plea bargain if it terminated all business

between Dr. Al-Arian and the Department of Justice. The government never contested this as being the overarching purpose of the plea agreement.

6. Once plea negotiations commenced, we made clear to the government that we wanted to bind all prosecuting authorities in the U.S. federal government—essentially the U.S. as a sovereign power—to the plea agreement. We referred to this a s "global plea."

7. On February 7, 2006, I had a conversation, among many, with Assistant United States Attorney Cherie Krigsman on various issues to be negotiated, including the "global aspect of the plea agreement" as we proposed. She indicated that her office understood our position and believed it to be "reasonable," but she wanted to insert more "appropriate language" than our version. At that time, Ms. Krigsman indicated she did not know of anyone else, in any other jurisdiction, "who is interested in Sami." In my tenure of working with Ms. Krigsman throughout this trial, her unassailable integrity assured me that this would not be a problem for us.

8. Ultimately, the government took the position that it was not inclined to change the "boilerplate language" of the standard plea agreement used by the U.S. Attorney's Office for the Middle District of Florida. While the specific language we suggested regarding the global plea did not survive the numerous revisions of the plea agreement—in that the

government did not want to bind the U.S. government as an entire entity to the agreement—the government finally agreed to add the Eastern District of Virginia to the parties bound by the plea agreement.

9. In Ms. Krigsman's recorded recitation at the plea colloquy on April 14, 2006, she informed the Court that she had the "specific authority to bind the Eastern District of Virginia" to the plea agreement. This oral amendment was given in turn for our abandonment of the original language regarding the "global plea."

10. The clear intention of both the defense and the government was an expedited deportation of Dr. Al-Arian, thus we stipulated to deportation.

11. The government agreed to recommend to the sentencing Judge the low end of the Guidelines. As originally contemplated, this would have essentially resulted in a sentence of time served.5 It was explicitly discussed and agreed between the defense and the government that the usual 85% formula applied to a sentence would calculate Dr. Al-Arian's sentence out to 39.1 months; Dr. Al-Arian had served nearly 39 months at the time of his sentence on May 1, 2006. It was my expectation that Dr. Al-Arian would be sentenced to the low end of the Guidelines. I

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[5] At the time of the plea negotiations, Dr. Al-Arian had served 39 months in prison. The low end of the Guidelines sentence as agreed was 46 months, with the top level of 57 months.

believe this expectation was shared by the government as well

12. As a result of the sentence calculations, it was expected that immediately upon his release from incarceration, Dr. Al-Arian would be deported. In fact, the government explicitly and on the record, indicated it s assistance in expediting Dr. Al-Arian's deportation.

13. This position necessarily negated any contemplation of cooperation by Dr. Al-Arian in another jurisdiction, most particularly in the Eastern District of Virginia, which was specifically bound by the plea agreement.

14. Sometime in May 2006, Ms. Krigsman called to inform me that Assistant United States Attorney Gordon Kromberg, of the Eastern District of Virginia, was going to subpoena Dr. Al-Arian to testify before a federal grand jury.

15. I conveyed to Ms. Krigsman my profound disappointment in what I believed to be a violation of the plea agreement.

16. Notwithstanding this unexpected news, I did not believe Ms. Krigsman either knew of AUSA Kromberg's intent to compel Dr. Al-Arian to testify before the grand jury in Virginia at the time of our plea negotiations or deceived the defense regarding the non-cooperation aspect of the parties' plea agreement.

17. I further expressed my belief that Dr. Al-Arian was being called before the grand jury as a

perjury or contempt trap. Ms. Krigsman denied this as being the purpose of the grand jury proceeding in Virginia.

In conformity with 28 U.S.C. § 1746, I, Linda Moreno, Esq., declare under penalty of perjury that the foregoing is true and correct. Executed on October 25, 2006.

/s/ Linda Moreno
Linda Moreno